

The parties stipulated that written claim was received by respondent on February 4, 1998, and that the employer's report of accident was filed with the Division on

February 10, 1998. An Employer's Report of Accident was also filed on October 11, 1996 for an accident that occurred on September 27, 1996.

On September 27, 1996 claimant received an electrical shock when trying to adjust a thermostat. Claimant described that shock as follows: "It grabbed me and then when it finally let me go, it threw me back against a credenza."

She reported this incident to her employer and received authorized medical treatment. When she was released from medical treatment, she was not having any problems with her back. She returned to her normal job duties on or about September 30, 1996. Claimant's duties with respondent included registration, clerical data entry and customer service.

Approximately a week to 10 days after claimant returned to work, her office was moved to a new location. Those offices had steel security windows and claimant's job included opening and closing those windows three to four days a week. She described the procedure as follows:

The windows were awkwardly placed from where our desks were and we had to literally climb on top of our desks, unlock the windows and raise them as far as we could because they were very hard to open. We would get them open about 2 inches and we walked around to the outside of the building and had to lean over a counter top to push them up far enough so that we could go back inside and get back on your desks, stand up and push them to the top.

It was later determined that the windows had been installed improperly. After adjustments were made, the windows were easier to open, but not considerably so. Claimant described the new procedure for opening the windows as follows:

We were given like a prune stick rod that had a metal hook on the top. We had to get over our desks to open them far enough so that we could push them open on their ribbed edges.

Claimant testified she began to notice tightness and pain in her back shortly after moving into the new location and after beginning the tasks of opening and closing the metal windows. As time went on, her symptoms worsened. Claimant also testified that she complained almost daily to her supervisor, Dr. Lin Knudson the Associate Dean of Continuing Education, about the problems she was having with the windows and that opening and closing the windows was hurting her back.

During a routine physical examination in January 1997, claimant told her personal physician, Dr. Wardlow, that she was having pain in her back. He recommended stretching exercises, which she did. Claimant did not tell Dr. Wardlow that her back pain was work

related. But claimant testified she continued opening and closing the windows at work and her symptoms continued to worsen.

After Dr. Wardlow stopped practicing or retired, claimant began seeing Dr. Michael Manus. But he did not provide any treatment for her back. Claimant testified that she continued to have back pain and pain down her lower leg which caused her problems walking.

She eventually sought treatment from Dr. Andrea A. Arvan. Dr. Arvan prescribed Ibuprofen, anti-inflammatories, and physical therapy. Dr. Arvan was in the process of scheduling the physical therapy when claimant suffered an exacerbation of pain over the Fourth of July weekend. She sought treatment at the emergency room of Olathe Medical Center. The following Monday claimant contacted Dr. Arvan and was admitted to Menorah Medical Park. Orthopedic surgeon Dr. Larry F. Glaser became her treating physician at that time. He ultimately performed surgery on claimant's back at Research Hospital. This July 16, 1997 surgical procedure consisted of a lumbar laminectomy and disc excision at L5-S1. Claimant missed eight weeks of work beginning July 3, 1997.

The July 7, 1997 history and physical taken by Dr. Arvan at Menorah Medical Park described intermittent low-back pain since October but stated that her symptoms had considerably worsened since the Thursday prior to admission.

The July 11, 1997 consultation with Dr. Gerald McNamara at Menorah Medical Park described an onset of left leg and low back problems in October - November 1996 which had dissipated and improved until Easter when she had another exacerbation of symptoms. They improved again until about a week before this consultation when she had increasing pain and discomfort.

Respondent has never provided claimant with medical treatment for her back. But, claimant admits that she never requested that her employer provide her medical treatment before her February 10, 1998 letter and the July 6, 1998 notice of intent letter prepared by her attorney.

Although claimant first testified that she had only complained about her back and did not relate the back pain to her work, did not ask her employer for medical treatment until February 1998, and did not report her back pain as a workers compensation injury until February 1998, she subsequently changed her testimony to allege that she complained all along to her supervisor, Dr. Lin Knudson, that her back pain was work related. Claimant also stated that she reported her condition as a work-related injury to Dr. Arvan when she was admitted at Research Hospital and thereafter to every nurse she saw and to Dr. Gerald R. McNamara and Dr. Glaser. Claimant also related complaining to Dr. Knudson about pain from sitting in a chair after she came back to work following surgery. The medical records before the July 1997 hospital admission, however, do not attribute the back pain to a work-related injury.

Claimant said she told Dr. Knudson, Julie Bell, Judith Choice, Sue Sliteso, Vicki Lenz, Lisa Loomis, and Flossie Cornealson that she had back pain caused by lifting the windows, but the testimony is not clear as to when these conversations are alleged to have occurred.

Claimant said she told Dr. Knudson that her back was hurting due to lifting the windows prior to obtaining any medical treatment. There is no evidence that any of the other individuals mentioned were claimant's supervisors or were in any supervisory capacity or otherwise authorized to receive notice for respondent.

Claimant received authorized medical treatment from the Business and Industry Group for the September 27, 1996 work-related accident. On cross-examination, claimant denied injuring her low back in the September 27, 1996, electrical shock accident and stated that she was not claiming her current injuries arose from that incident. Claimant reiterated that her back trouble only began after she started lifting the windows in October of 1996.

In her February 10, 1998 letter, however, claimant stated that she believed the electric shock incident was the start of her back problems and that they were aggravated by having to open and close the metal windows. Claimant also wrote that she had described the windows as the cause of her back pain to all of her doctors.

Dr. Glaser released claimant to return to work without restrictions effective August 18, 1997. On October 10, 1997, claimant reported to Dr. Glaser that she wanted a note to the effect that she should not lift overhead doors.

In April or May of 1998, Dr. Glaser referred claimant to a neurologist, Dr. Stacy D. Younger. Dr. Younger put claimant in physical therapy. The May 15, 1998 report by Dr. Younger to Dr. Glaser relates onset of back and leg pain to an October 1996 electrical shock incident. Claimant reported progressive worsening thereafter but there is no mention of work being the cause of that worsening. The July 9, 1998 office note of Dr. Younger makes no mention of a work-related injury.

The deposition of Lin Knudson, Ph.D., Associate Dean of Continuing Education and Community Services at Johnson County Community College, was taken August 6, 1998. She is claimant's supervisor. There is no one else in her department or area that has supervisory responsibilities over claimant. Claimant advised Dr. Knudson of the electrical shock incident but did not mention any back injury as a result of that shock. Claimant never advised her that she sustained an injury to her back as a result of lifting the metal windows in October, November or December 1996. Only after claimant's back surgery did Dr. Knudson become aware that claimant was complaining of a back problem related to raising windows at work. She received a statement from claimant's physician in October 1997 that said claimant was not to open windows and that she was to have an ergonomic chair. Dr. Knudson acknowledged that claimant had mentioned back problems several

times in the past, usually in reference to her chair, but claimant never related her back problems to the work she was performing. Even the note from the physician in October 1997 did not say claimant's back injury was from work but rather only restricted claimant from opening windows. As for claimant's claim that she also mentioned her back problems to Julie Bell, Sue Scheitzow, Judith Choice, Vicky Lenz, Liz Loomis, and Flossie Cornealson, none of them had any supervisory authority or responsibility over claimant and none of these people were designated for giving notice of injury on the job. Only Dr. Knudson was designated for that purpose and her first notice that claimant was alleging a work injury was when claimant filed a workers compensation claim. She later received a copy of the February 10, 1998 letter by claimant from the college's Human Resources office, but she does not know when she received that copy.

According to Dr. Knudson, claimant never complained to her that she injured her back lifting windows. The continuing education registration department moved into the new building on or shortly after October 12, 1996 and Dr. Knudson was claimant's supervisor the entire time claimant worked in the new building. All injuries are to be reported to Dr. Knudson and there is a Human Resources form that must be filled out that Dr. Knudson would sign and forward to Human Resources. Dr. Knudson never filled out such a form for claimant before claimant's surgery in July 1997. Although the minutes of the February 7, 1998 and October 7, 1997 staff meetings indicate that there were problems with opening the windows, they make no mention of claimant or anyone else having sustained an injury due to the windows.

#### **CONCLUSIONS OF LAW**

Claimant bears the burden of proof to establish her right to an award of compensation. K.S.A. 44-501(a) provides that a claimant must prove "the various conditions on which the claimant's right [to compensation] depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-508(g) defines the term "burden of proof" as "the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." Based upon the record compiled to date, the Appeals Board finds claimant has failed to meet this burden.

Claimant has not met her burden of proving injury by accident arising out of and in the course of employment, timely notice of accident, and timely written claim. There is no mention in the medical records of the physicians that treated claimant contemporaneous with the period of the alleged series of accidents that claimant's symptoms are due to her work activities. Claimant's symptoms from the September electrical shock incident had resolved before her low-back complaints started in October or November 1996. In addition, claimant's low-back symptoms had substantially subsided or resolved in the Spring of 1997 before the exacerbation around Easter and again before the exacerbation in July 1997. Furthermore, there is no medical opinion relating the July exacerbation to

claimant's work. The EMG and MRI testing performed before July 1997 did not reveal a herniated disc whereas the testing performed during July did show a herniated disc and, in fact, showed that disc herniation becoming larger. There is no medical opinion and claimant does not testify to a direct relationship between her July 1997 exacerbation and/or disc herniation and work. Claimant has failed to prove that her July 1997 surgery was caused by an injury at work or that it was the natural progression of her alleged September, October or November 1996 work injuries. The Appeals Board finds claimant has failed to prove her back injuries were due to an accident or accidents that arose out of and in the course of her employment with respondent.

K.S.A. 44-520 requires notice of accidental injury to be given within 10 days. This time period may be extended to 75 days for just cause. K.S.A. 44-520a requires written claim be delivered to the employer within 200 days of the date of accident. Claimant last worked on or about July 3, 1997 before undergoing back surgery. This is also the last date in the series of accidents claimant alleges. Notice that her back problems were work related was not given and written claim was not made until February 1998. Therefore, the Appeals Board finds notice and written claim were not timely made. Also, claimant's reliance upon K.S.A. 44-557 to extend her time for filing written claim from 200 days to one year fails because of the lack of notice.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the August 10, 1998 Order by the Administrative Law Judge should be, and is hereby, reversed. Preliminary hearing benefits are denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1998.

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BOARD MEMBER

c: Michael R. Wallace, Shawnee Mission, KS  
Anton C. Andersen, Kansas City, KS  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Director